IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Detention of: DAMON LEE, Appellant.	No. 31900-4-II UNPUBLISHED OPINION

BRIDGEWATER, J. — Damon Lee appeals his commitment as a sexually violent predator under chapter 71.09 RCW. We affirm.

On July 5, 1990, Damon Lee pleaded guilty to first degree rape of Debra Hutchins. This rape was Lee's only conviction for a sex offense. He served 96 months for that offense, and, in November 1999, just before his release, the State petitioned to commit him under chapter 71.09 RCW as a sexually violent predator.

Although Lee was only convicted of one sexual offense, the State alleged that he actually committed 12 to 13 sexual assaults. In addition to Debra Hutchins's deposition testimony about her 1990 rape, Mary Rhyan testified that in March 1973, when she was six years old, Lee kidnapped her, took her into the woods, and forced her at knifepoint to perform oral sex on him. Gwendolyn Bones testified that in March 1989, Lee raped her at knife point in an abandoned house. And Yolanda Pouncey recounted that, in 1989 when she was 14, Lee gave her a ride, took her to his house, and raped her repeatedly at knife point.

Lee admits that he committed these rapes. While serving his sentence for raping Hutchins, he participated in sex offender treatment. As part of that treatment he wrote a sexual autobiography detailing his sexual history. In this document, in addition to admitting the rapes of the four women who testified, Lee admitted to several other rapes and sexual assaults in lurid detail. Most of these assaults occurred between 1988 and 1990.

Lee's civil commitment trial began in April 2004. From 1990 to the time of trial in 2004, Lee was either in prison or at the Special Commitment Center on McNeil Island. Lee was, therefore, in custody during the trial. On one occasion, during the voir dire process, two security officers escorted Lee, unshackled, into the court room in full view of the jury panel. Lee moved for a mistrial, but the trial court determined that Lee was not prejudiced and denied the motion.

During the trial, the State introduced Dr. Richard Packard as an expert witness. Dr. Packard diagnosed Lee with "Paraphilia Not Otherwise Specified: Non-Consent," a mental abnormality. 6 Report of Proceedings (RP) (Apr. 27, 2004) at 569. This condition involves sexual fantasies and urges to have "coerced forced sex" that impair the person's ability to function

socially, occupationally, and interpersonally. 6 RP at 569. Dr. Packard also determined that Lee suffered from an antisocial personality disorder, and that Lee tested as a psychopath.

In addition, Dr. Packard used actuarial tests to help predict whether Lee was likely to reoffend if released. These tests are based on studies in which researchers followed released sex offenders and determined what characteristics those who reoffended shared. The researchers then created actuarial tools to predict an offender's likelihood of reoffending based on the presence or absence of those characteristics. The tools follow coding rules that weight certain characteristics differently. Dr. Packard warned that a clinician must follow the rules exactly as set out by the researchers and that although it is tempting to alter the coding rules: "[Y]ou can't. You have to do it just like they said." 6 RP at 629.

Dr. Packard used three actuarial tools. On the STATIC-99 test, Dr. Packard scored Lee as being 52 percent likely to reoffend within 15 years. On the Minnesota Sex Offender Screening Tool-Revised (MnSOFT-R), Dr. Packard scored Lee as being 73 percent likely to reoffend within six years, and on the Sex Offender Risk Appraisal Guide (SORAG), Dr. Packard scored Lee as being 75 percent likely to reoffend.

The scoring rules for these tests require the scorer to count convictions rather than all offenses. Despite Dr. Packard's warning about the scoring rules, the State asked Dr. Packard to assume that Lee had been convicted for all his offenses and rescore the test. Again warning that it would be unofficial, Dr. Packard rescored the MnSOFT-R and determined that Lee would be 88 percent likely to reoffend in that hypothetical case, 15 percent higher than his actual score. Dr. Packard rescored the SORAG test as well and came up with a prediction that Lee was 100

percent likely to reoffend, 25 percent higher than his original score.

During the trial, Lee also pointed out that he had filed a racial discrimination complaint against one of his counselors who had given him a negative evaluation. In his closing argument, Lee, who is African American, argued that several of the tests Dr. Packard used were racially biased and that the counselors who gave Lee negative reviews during sex offender treatment were also racially biased. In rebuttal, the State denied there was racial bias, noted that two of the rape victims were African-American, and invited the jury to consider fairness for them.

The jury found that Lee was a sexually violent predator, and the trial court ordered Lee committed.

ANALYSIS

I. Hypothetical

Lee first argues that the trial court should have excluded Dr. Packard's testimony that if Lee's offenses were scored as convictions on the two actuarial tests, he was more likely to reoffend. He asserts that the only accepted use of actuarial tests is to follow the scoring rules researchers set and that the State laid an inadequate foundation for allowing Dr. Packard to break those rules to answer the hypothetical. The State replies that the hypothetical was based on facts that Lee admitted and therefore was permissible. Lee is correct.

A trial court has broad discretion in admitting expert evidence under ER 702, and we review a trial court's decision to admit expert testimony for abuse of discretion. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Perrett*, 86 Wn. App.

312, 319, 936 P.2d 426 (1997) (citing *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)), *review denied*, 133 Wn.2d 1019 (1997).

Actuarial assessment tests are admissible in sexually violent predator commitment trials so long as they satisfy ER 403, ER 702, and ER 703. *In re Detention of Thorell*, 149 Wn.2d 724, 758, 72 P.3d 708 (2003), *cert. denied*, 541 U.S. 990 (2004). A party may introduce expert testimony if the expert is properly qualified, relies on generally accepted theories, and is helpful to the trier of fact. ER 702; *Philippides*, 151 Wn.2d at 393. But an expert may not testify outside the area of his expertise and his opinion within his area of expertise must be backed by sufficient factual foundation. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 104, 882 P.2d 703, 891 P.2d 718 (1994). A speculative expert opinion lacking adequate foundation is inadmissible. *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010 (1992).

Here, Dr. Packard testified that to use the actuarial tests properly, an evaluator must follow the scoring rules. He clearly explained that these scoring rules are based directly on the research studies. And one of the scoring rules for these tests is that convictions are counted while uncharged offenses are not. Dr. Packard explained why convictions are important predictors:

> Because having a history of committing prior offenses and getting caught, you know, receiving a consequence, and then going out and doing it again, is a very powerful predictor all by itself, so that's why it gets that extra weight.

6 RP at 631. Thus, in order to score the hypothetical and count all Lee's offenses as convictions, Dr. Packard had to violate the scoring rules that he warned could not be broken. Dr. Packard

even warned the State that scoring the hypothetical would be unofficial.

Having established that the actuarial tools require strict adherence to the scoring rules and that those scoring rules were scientifically derived, the State cannot pose a hypothetical that alters those scoring rules without undermining the scientific foundation that renders actuarial tools admissible. For example, under ER 703, an expert may rely on evidence "of a type reasonably relied upon by experts in the particular field." ER 703. But Dr. Packard testified that experts in his field must follow the scoring rules exactly. What is more, Dr. Packard did not use the inflated scores in his own analysis, indicating his own reluctance to rely on such evidence in predicting future dangerousness. Thus, the testimony based on the hypothetical lacked a proper foundation and was inadmissible. *McGrath*, 63 Wn. App. at 177.

ER 403 concerns dictate the same result. Because of the strong potential for prejudice, Washington courts have noted that profile evidence is generally inadmissible. *Thorell*, 149 Wn.2d at 757; *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). In the context of sexually violent predator commitment proceedings, because expert predictions of future dangerousness are central to the ultimate question, courts have ruled that an actuarial assessment's probative value is sufficient to justify admission even in the face of such prejudice. *Thorell*, 149 Wn.2d at 758. Given the strong potential for prejudice, however, misuse of those actuarial assessments, cloaked as they are in scientific authority, alters the balance between probative value and prejudice under ER 403. Testimony based on improper use of actuarial tests should therefore have been excluded under ER 403.

On appeal, the State argues that the hypothetical was relevant to illustrate Dr. Packard's

testimony that the actuarial tests tend to underpredict recidivism, in part, because they measure the likelihood that a released sex offender will be convicted again rather that reoffend. Dr. Packard reasoned that because some offenders might reoffend without being caught, the tests underpredict the likelihood of reoffense. But the State makes too much of this testimony. First, although the State makes this argument on appeal, the hypothetical and this testimony were not linked together at trial. Second, even assuming that the tests underpredict recidivism, the State would have had to establish that the hypothetical compensated for that flaw. But Dr. Packard did not testify that the way to compensate for potential underprediction was to alter the basic scoring rules. Therefore, the State's post hoc explanation is insufficient to justify admission. Thus, the trial court abused its discretion by allowing the State to present its hypothetical.

Although it was error to admit Dr. Packard's hypothetical, the error was harmless. The test for determining whether erroneously admitted evidence requires reversal is whether, within reasonable probabilities, the trial's outcome would have been materially affected if the error had not occurred. *Braham*, 67 Wn. App. at 939. The improper admission of evidence is harmless if the evidence is of minor significance in reference to the evidence as a whole. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, the State's burden was to prove, beyond a reasonable doubt, that Lee was likely to engage in predatory acts of sexual violence if not confined to a secure facility. RCW 71.09.020(16). Excluding the improper hypothetical, there was more than sufficient evidence to support that conclusion. Using the proper scoring rules, the three actuarial tests Dr. Packard used predicted that the likelihood Lee would reoffend was 52 percent, 73 percent and 75 percent.

These percentages were more than enough to prove that Lee was likely to reoffend. The altered scores only raised the later two scores by 15 percent and 25 percent respectively. In other words, the hypothetical was redundant.

Moreover, the prejudice from the hypothetical was minimized almost as soon it was offered. Dr. Packard warned the State's attorney and the jury that the results would be unofficial. And Dr. Packard did not rely on the altered actuarial tests in reaching his opinion that Lee was likely to reoffend. Moreover, as the State points out, the hypothetical consisted of three pages out of a 2,074 page record, which included about 1,000 pages of expert testimony. In such a large record with so much expert testimony, the hypothetical was not so prejudicial as to have affected the outcome. Given the number and brutality of the sexual acts that Lee admitted to in detail and the testimony of the victims at trial, exaggerating Lee's actuarial test scores would not have affected the outcome. The error was harmless.

II. Misconduct

Lee next argues that inviting the jury to consider fairness to Lee's two African-American victims was prosecutorial misconduct. The State attempts to justify the remarks as a valid response to Lee's allegations of racial discrimination. In the alternative, the State argues that the misconduct did not rise to the level of reversible error.

Initially, both parties assume that we should evaluate Lee's claim under the same standard that we evaluate criminal prosecutorial misconduct. And Division One of this court has seemingly followed that approach without analysis in *In re Detention of Gaff*, 90 Wn. App. 834, 954 P.2d 943 (1998). But our Supreme Court has held that our sexually violent predator commitment

statute is not criminal but civil. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). As the State points out, a respondent in a commitment proceeding has fewer constitutional protections than a criminal defendant. For example, the Fifth Amendment right to remain silent and presumption of innocence instruction in a criminal trial are inapplicable. *In re Detention of Twining*, 77 Wn. App. 882, 895, 894 P.2d 1331, *review denied*, 127 Wn.2d 1018 (1995).

But as a matter of public policy, we hold the State to the same standard as a criminal prosecutor in these commitment proceedings, with respect to appeals to emotion and bias. First, even in civil cases, it is inappropriate to appeal to the jury's bias or emotions. *See e.g. Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 139, 750 P.2d 1257 (1988) (finding an argument improper where it "encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence."). Such misconduct is reversible error in civil cases where it is substantially likely to have affected the jury's verdict. *Carnation Co. v. Hill*, 115 Wn.2d 184, 186, 796 P.2d 416 (1990). But generally, because "life and liberty are not at issue," the standard in civil cases is somewhat more lenient than in criminal cases. *ALCOA v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000). In the case of an involuntary commitment proceeding, however, the respondent does risk his liberty. Therefore, the somewhat more lenient standard for misconduct in civil cases does not apply.

Second, the rationale for holding prosecutors to a higher standard is that a prosecutor is a quasi-judicial officer acting for the citizens of the State and is cloaked in apparent impartiality. *State v. Reed*, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984) (citing *State v. Case*, 49 Wn.2d 66,

70-71, 298 P.2d 500 (1956)). An assistant attorney general seeking to commit a sexually violent predator in order to protect the community similarly acts as a quasi-judicial officer on behalf of the State. Thus, the State's attorney should be held to a higher standard of impartiality.

Under the criminal prosecutorial misconduct standard, the defendant had the burden of establishing that a prosecutor's argument is improper. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). In addition, the defense must show that the prosecutor's argument prejudiced the defendant. *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). Prejudice is only established if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998); *Carnation Co.*, 115 Wn.2d at 186.

In a closing argument, the State's attorney has wide latitude in drawing and expressing reasonable inferences from the evidence. *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991); *Jones v. Hogan*, 56 Wn.2d 23, 31, 351 P.2d 153 (1960). We review allegedly improper arguments in the context of the total argument, the issues in the case, the evidence addressed in argument, and the instructions given. *Russell*, 125 Wn.2d at 85-86. And reversal is inappropriate if the error could have been obviated by a curative instruction that the defense did not request. *Russell*, 125 Wn.2d at 86; *City of Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993). If the defendant fails to object to a State's attorney's remark, he must show that the error was so flagrant and ill-intentioned that it evinces an enduring prejudice that could not be neutralized by an admonition to the jury. *Hoffman,* 116 Wn.2d at 93; *McUne v. Fuqua*, 42

Wn.2d 65, 78-79, 253 P.2d 632 (1953).

Here, responding to a charge that one of Lee's counselors was racially biased because Lee was African American, the State's attorney said:

> And speaking of racial bias, the two victims from whom we heard here were both African American women. When we're concerned about somebody not getting a fair break, let's consider these African American victims.

19 RP (May 19, 2004) at 2056. The State's attorney then recounted the testimony of the two women. These African-American women were two of three victims who testified at Lee's trial.

This comment is highly inappropriate in the context of sexually violent predator commitment proceeding. First, the State may not invite the jury to consider finding against Lee because he chose African-American victims. The State may not appeal to racial bias even to refute a claim of racial discrimination.

Second, as Lee asserted at oral argument, the statement also appealed to the jury's passion to punish him for those events for which he was not prosecuted. The only issues in this case were whether Lee (1) had committed a sexually violent offense; (2) suffered from a mental abnormality or personality disorder that caused him serious difficulty in controlling his behavior; and (3) was likely to engage in predatory acts of sexual violence if not confined to a secure facility. RCW 71.09.020(16). Fairness to his victims was, therefore, not an issue in this case and by inviting the jury to consider fairness to Lee's victims, the State's attorney asked the jury to make a decision on improper grounds.

In fact, to make a decision on those grounds—as punishment for past crimes—would be unconstitutional. *See Kansas v. Hendricks*, 521 U.S. 346, 369-70, 117 S. Ct. 2072, 138 L. Ed.

2d 501 (1997) (upholding a Kansas commitment statute, which was based on Washington's statute, against a double jeopardy challenge because the State disavowed any punitive intent.). Moreover, if this had been a criminal trial intended to punish Lee for his prior bad acts, he would have been entitled to full criminal constitutional protections. But he did not receive those protections in this case. We hold the State cannot ask the jury to find against a defendant in a sexually violent predator proceeding as a punishment for past crimes.

But Lee did not object to the misstatement. Therefore, we must determine if the comment was so flagrant and ill-intentioned that it could not have been neutralized by an admonition to the jury. *Hoffman,* 116 Wn.2d at 93. While this statement was highly inappropriate, a number of factors mitigate its prejudice. First, the State's attorney introduced her rebuttal by properly noting that: "This case is not about racial bias. . . . It's about whether Damon Lee meets the statutory criteria that are set forth in the jury instructions." 19 RP at 2052. She continued by noting that:

> The question here isn't whether the State wants to punish Mr. Lee. It's not about punishment. Counsel is absolutely right there. This is not about punishing Mr. Lee for things he didn't get punished for.

19 RP at 2053. As these remarks indicate, the State did not rest its case an improper premise even if the challenged remark did invite the jury to consider it.

Second, the comment came in the rebuttal rather than State's closing argument as the State's attorney tried to rebut a claim of racial discrimination. And in her initial closing statement, the State's attorney made it clear that Lee's prior acts were relevant only because they showed that Lee suffered from recurrent sexual desires and that he had difficulty controlling his behavior.

Taken in context, the State's attorney's attempt to rebut Lee's racial discrimination charge appears to have been a spontaneous, if over-exuberant, remark and not a calculated attempt to inflame the jury.

Considering the entirety of the State's closing argument, her statement was not so flagrant and ill-intentioned that a prompt curative instruction would not have cured any prejudice. The error was harmless.

III. Correction Officers

Lee next argues that the trial court erred in denying his motion for a mistrial when the jury venire saw him escorted into the courtroom during voir dire. The State argues first that it was not improper for the jury to see Lee escorted by officers because this was a civil trial rather than criminal. In the alternative, the State argues that Lee was not so prejudiced as to warrant a new trial.

We review a trial court's decision granting or denying a mistrial for abuse of discretion. *Adkins*, 110 Wn.2d at 136. A respondent in a civil commitment proceeding has a constitutional right to a fair trial. *In re Detention of Ross*, 114 Wn. App. 113, 121-22, 56 P.3d 602 (2002), *review denied*, 149 Wn.2d 1015 (2003). If allowing the jury to see Lee escorted prejudiced the jury so as to have denied Lee a fair trial, a mistrial should have been granted. *State v. Rodriguez*, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). The trial court is a much better position to judge potential prejudice. *Discargar v. City of Seattle*, 30 Wn.2d 461, 470, 191 P.2d 870 (1948). We therefore defer to the trial court's determination of prejudice.

The State correctly notes that a respondent's constitutional rights in a civil commitment

proceeding are less than those of a criminal defendant. *Twining*, 77 Wn. App. at 895. The State therefore argues that Lee does not have a right to appear in court without restraints or restrictions. We do not need to reach this issue because Lee cannot demonstrate any prejudice.

Although the jury panel may have seen Lee escorted into the jury room and inferred that he was in custody, Lee introduced that evidence in the trial anyway. At the prompting of his own counsel, Lee testified that he had not committed any rapes since 1990. On redirect, the State then sought to explain that answer by asking Lee if he had been continuously in custody since 1990. Lee answered that he had. In addition, Lee did not object when the trial court allowed the jury to present questions, including the question:

> Mr. Lee, is it not true that since 1990 you have either been in prison or confined at the Special Commitment Center pending the resolution of this case?

5 RP (Apr. 26, 2004) at 469. Lee against answered that he had.

Because Lee introduced testimony that he had not committed any rapes since 1990, he opened the door for the State to introduce that the reason was that he had been in prison. Accordingly, Lee's custody status was properly before the jury.

There is no indication in the record that the officers actively restrained Lee or acted as though he was a danger to escape or to hurt others. The record suggests that he was simply preceded and followed by officers into the room and that the officers sat behind him in the audience. Thus, the record does not support the conclusion that the jury would have inferred that he was dangerous—just that he was in custody. Any prejudice that may have been caused by seeing Lee escorted by officers was therefore minimal and Lee was not denied a fair trial. There

was no error.

IV. Cumulative Error

Last, Lee argues that cumulative errors denied him a fair trial.

Under the cumulative error doctrine, Lee may be entitled to a new trial when errors, even though individually not reversible error, cumulatively produced a trial that was fundamentally unfair. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *cert. denied*, 513 U.S. 849 (1994). Lee bears the burden of proving an accumulation of errors that would make a retrial necessary. *Lord*, 123 Wn.2d at 332.

Although there were errors in this trial, they did not deprive Lee of a fair trial. Lee had a four-and-half-week-long trial and had a full opportunity to present his defense. A short remark by the State's attorney and relatively short testimony about an improper hypothetical did not fatally undermine the fairness of the trial.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Penoyar, J.